Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1461

In The
Supreme Court of the United States
October Term, 1984

PROVIDENCE BUILDERS, INC., et al.,
Petitioners,

vs.

ZONING HEARING BOARD
OF LOWER PROVIDENCE TOWNSHIP,

LOWER PROVIDENCE TOWNSHIP,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RICHARD C. SHEEHAN
Counsel of Record for Respondents,
2790 Egypt Road
Audubon, PA 19403
(215) 666-7464

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the decision of a state appellate court, that its own prior order to a township to issue a zoning permit had in fact, been obeyed by that township by issuing the permit to the real party in interest under state law, should stand because there are no federal or constitutional questions involved, and the decision was correct on the merits?

A. TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	ii
I. STATEMENT OF JURISDICTION	1
II. STATEMENT OF THE CASE	1
III. REASONS FOR DENYING THE WRIT:	
A. The questions presented were not raised or preserved below.	5
B. Only questions of evidence and factual findings are involved in this case.	8
C. The allegedly conflicting decisions are state court decisions involving state laws, are not applicable to this case, and are completely distinguishable on their facts.	11
D. The court below fully considered and correctly decided the issue.	15
IV. CONCLUSION	25
APPENDIX	App. 1

B. TABLE OF CITATIONS

CASES CITED:

Agins v. City of Tiburon, 447 U.S. 255 (1980)	13
Bowe v. Scott, 133 U.S. 658, 664-65	6
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	13
Herb v. Pitcairn, 324 U.S. 117, 125-26	12
Live Oak Ass'n v. Railroad Commission, 296 U.S. 354, 357-58	7

TABLE OF CITATIONS—Continued

Page

Lynch v. New York ex rel Pierson, 293 U.S. 62, 54 7

Moyer's Landfill, Inc. v. Zoning Hearing Bd. of Lower Providence Township, 69 Pa. Commonwealth Ct. 47, 450A.2d 273 (1982) 10, 20

O'Leary v. Moyer's Landfill, Inc., Civil No. 80-3849 (D.Pa.) 2

Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 6

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) 13

Pennsylvania Turnpike Commission v. Evans, 13 Pa. D&C2d 290, 298-99 (1958) 16

Raum v. Board of Supervisors of Tredyffrin Tp., 27 Pa. Commonwealth Ct. 9,370 A.2d 777 (1977) 10, 22, 25

San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 13

White River Lumber Co. v. Arkansas ex rel. Applegate, 279 U.S. 692, 700 6

Whitney v. California, 274 U.S. 357, 362-63 6

STATUTES CITED:

Act of July 9, 1976, P.L. 586, sec. 2, 42 Pa. C.S.A. sec. 562 10

Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. Section 10101 et seq. 12

TABLE OF CITATIONS—Continued

Pages

RULES CITED:

Rule XV, Internal Operating Procedure of the Commonwealth Court of Pennsylvania 9

Pennsylvania Rule of Appellate Procedure 2591(b) 10, 22

OTHER AUTHORITIES CITED:

Robert Ryan, *Pennsylvania Zoning Law and Practice*, Sec. 9.4.30 (March 31, 1981) 21

C. APPENDIX

Memorandum Opinion and Order of the Commonwealth Court of Pennsylvania filed December 19, 1983 ..... App. 1

I. STATEMENT OF JURISDICTION

Jurisdiction is not conferred upon this Court by 28 U.S.C. section 2101(c) because there are no constitutional claims, federal questions, or federal statutes presented for review.

II. STATEMENT OF THE CASE

This case began with the filing by petitioners of a petition seeking substitution of parties and enforcement of a prior court order with the Commonwealth Court of Pennsylvania, the intermediate appellate court of that state. The Commonwealth Court denied the petition, *finding* as a matter of fact, that the prior order had been fully complied with by the Township. After a subsequent denial of their petition for reconsideration by the Commonwealth Court, petitioners filed a petition for allowance of appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court granted the petition for allowance of appeal. After briefing and oral argument, the Pennsylvania Supreme Court, without opinion, dismissed the appeal as having been improvidently granted. Thereupon, petitioners filed a writ of certiorari with this Honorable Court.

The undisputed facts in this case are as follows:

(1) In 1977, Moyer's Landfill, Inc., a Pennsylvania corporation, filed a zoning appeal seeking permission to use a tract of ground known as the Troop Farm in Lower Providence Township as a landfill.

(2) On September 14, 1982, the Commonwealth Court reversed the lower court's denial of that appeal and ordered the zoning authorities of Lower Providence Township to issue the zoning permit (R.2a).

(3) In July, 1982, Moyer's Landfill, Inc. was placed in Receivership by the order of federal court, the Honorable Louis J. Pollack, in the matter of *O'Leary v. Moyer's Landfill, Inc.*, Civil No. 80-3849 (D.Pa.) (R.26a). (This action placed Moyer's Landfill, Inc. under the supervision of a court-appointed Receiver. Petitioners alleged this fact in paragraph 5 of their petition for substitution of parties and enforcement of order (R.56a) and it was admitted by the respondent in paragraph 5 of its answer thereto (R.71a)).

(4) On September 29, 1982, Joanne Denworth, Esquire, the federal Receiver for Moyer's Landfill, Inc., wrote a letter addressed to the Township Zoning Officer, Chairman of the Township Zoning Hearing Board, Chairman of the Township Board of Supervisors and the Township Manager, advising of her appointment as Receiver for Moyer's Landfill, Inc., that she had received the Commonwealth Court's opinion and order in the instant case, and requesting that the Township issue the permit to Moyer's Landfill, Inc. and forward it directly to her at the address provided (R.77a). A copy of that letter was sent by the Receiver to Howard and Catherine Moyer and Stephen H. Lupin, Esquire, *inter alia*.

(5) Stephen H. Lupin, Esquire, was counsel of record for Moyer's Landfill, Inc. in the Commonwealth Court in the instant case. He was an employee of the law firm of

Hamburg, Rubin, Mullin & Maxwell. J. Edmund Mullin, Esquire, is a partner in that firm. Mr. Mullin was, and is, counsel for Providence Builders, Inc. and Alternate Energy Store, Inc. as well as becoming the sole owner of Alternate Energy Store, Inc. (R.297a).

(6) The testimony established that neither petitioner, independently or through their attorneys, ever raised any objection with the Township regarding the Receiver's demand for the permit. Nor was any objection ever raised in the Federal Court.

(7) In January, 1983, the Township issued to Moyer's Landfill, Inc. the permit, as requested by Moyer's Landfill, Inc., for the use of the Troop Farm as a landfill.

(8) During the entire period from the Commonwealth Court's order on September 14, 1982, until July 15, 1983, no person or entity other than Moyer's Landfill, Inc. applied to or requested that the Township issue the permit ordered by the Commonwealth Court.

(9) The testimony of Providence Builders, Inc.'s President and sole owner was that he knew of the permit having been issued and a copy having been obtained by Howard Moyer (R.187a). Alternate Energy Store, Inc.'s President, who was also attorney for Providence Builders, Inc., testified he had been negotiating with the Receiver concerning the permit (R.143a).

(10) Neither petitioner ever filed an appeal from the issuance of said permit nor did anyone complain to the Township about its issuance.

(11) In December, 1982, after the Commonwealth Court's order, but before the Township issued the permit

to Moyer's Landfill, Inc., the Township enacted a zoning ordinance which rezoned a large section of the center of the Township R-1 Residential.

(12) Despite that rezoning, the Township, in January, 1983, issued the permit ordered by the Commonwealth Court.

(13) That rezoning was not used as a basis for a refusal to issue the permit to Moyer's Landfill, Inc.

(14) On March 18, 1983, Moyer's Landfill, Inc. returned the permit to the Township with a letter stating that there was no intention to make use of the permit (R. 296a).

(15) On July 15, 1983, Alternate Energy Store, Inc., for the first time, requested that the permit ordered by the Commonwealth Court on September 14, 1982, be issued to it (R.297a).

(16) That request was based upon an Agreement dated May 11, 1983, entered into between the Receiver for Moyer's Landfill, Inc. and Grange Environmental Corporation and Providence Builders, Inc., wherein the Receiver consented to an Option Agreement by Alternate Energy Store, Inc. and stated that Moyer's Landfill, Inc. disclaimed any interest in all permits. Copies of the Agreements were attached to Mr. Mullin's letter (R.298a).

(17) The Township advised Alternate Energy Store, Inc. that the permit requested had already been issued and the Commonwealth Court order complied with (R.69a).

(18) On September 28, 1983, petitioners Alternate Energy Store, Inc. and Providence Builders, Inc. filed a

petition for substitution of parties and enforcement of the prior order with the Commonwealth Court (R.55a).

(19) No question concerning the authority of the Receiver to apply for and obtain the permit ordered by the Commonwealth Court was ever raised in that petition (R.55a).

(20) On December 19, 1983, the Commonwealth Court, after argument and briefing, denied the petition for enforcement of court order and for substitution of parties (R.196a).

(21) On February 3, 1984, the Commonwealth Court denied the petition of Alternate Energy Store, Inc. and Providence Builders, Inc. for reconsideration, reargument and allowance to present additional evidence (R.329a).

(22) On June 5, 1984, appellants' petition for allowance of appeal was granted by the Supreme Court of Pennsylvania. After briefing and oral argument, the Pennsylvania Supreme Court dismissed the appeal as having been improvidently granted.

No federal question or constitutional issue was ever raised by the petitioners in the state courts. On the contrary, the case presents only evidentiary questions and factual findings unique to the petitioners.

———o———

III. REASONS FOR DENYING THE WRIT

A. The Questions Presented Were Not Raised Or Preserved Below.

For the first time in the history of this case, petitioners, in their writ of certiorari, alleged that the Fifth

Amendment due process clause and the Fourteenth Amendment due process clause have been violated. It is well-settled that a federal question cannot be raised for the first time in the writ of certiorari to this Court. *White River Lumber Co. v. Arkansas ex rel. Applegate,* 279 U.S. 692, 700; *Whitney v. California,* 274 U.S. 357, 362-63. Yet, this is precisely what petitioners do.

In the Commonwealth Court, the petitioners did not raise any violation of the Fifth Amendment or Fourteenth Amendment in their Petition for Substitution of Parties and Enforcement of Court Order (R.55a). The Commonwealth Court denied this petition, based on state grounds and the resolution of factual questions. In their Petition for Rehearing by the Commonwealth Court, *en banc,* petitioners make a vague reference to due process (R.207a). Certainly, this general language does not rise to meet the requirements of particularity in raising a federal question, as stated by this Honorable Court in *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655:

> the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

This Honorable Court in the past has held that a mere reference to "due process of law" is insufficient to invoke its jurisdiction. *Bowe v. Scott,* 233 U.S. 658, 664-65.

Struggle though they may, petitioners are unable to point to the raising of these questions in the state courts. In the Statement of the Case contained in their Writ of Certiorari (p. 7), petitioners attempt to convince this Court

that the federal questions indeed were raised and preserved below:

> The constitutional issue of exclusionary zoning was at the heart of the original challenge from its inception. *See The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge,* 81 Yale L. J. 61, 65-66 (1971). The federal constitutional due process issue was raised in the *briefs* submitted to the Commonwealth and Supreme Courts of Pennsylvania. . . .

(Emphasis added).

It is well-settled that briefs and oral arguments before state courts are not part of any record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Association v. Railroad Commission,* 296 U.S. 354, 357-58; *Lynch v. New York ex. rel Pierson,* 293 U.S. 62, 54. Petitioners then argue that constitutional issues were at the heart of the original challenge by Moyer's Landfill, Inc. to the zoning ordinance of Lower Providence Township. This is undisputed. It is also true that Moyer's Landfill, Inc. won that case when the Commonwealth Court declared the zoning ordinance unconstitutional. Lower Providence Township does not dispute that holding. That constitutional issue has been fully resolved, and any resurrection of it before this Honorable Court is clearly not justiciable.

Petitioners are attempting to cloud the waters by lumping the instant appeal together with the already-decided challenge to the constitutionality of the zoning ordinance, embodied in the September 14, 1982 order of the Commonwealth Court. If petitioners are raising a question as to that decision with this Honorable Court, their dead-

line has long since passed. The order of the Commonwealth Court of December 19, 1983 is the proposed subject of review by this Court. (*See* Statement of Jurisdiction of the Writ of Certiorari, p. 2.)

The Commonwealth Court order of December 19, 1983 denied the Petition for Substitution of Parties and Enforcement of Court Order. No constitutional grounds or federal questions were raised by the petitioners before that Court. Therefore, there is no jurisdiction of this Honorable Court to review the decision of the Common-Wealth Court of Pennsylvania dated December 19, 1983. The Writ of Certiorari must be denied.

B. Only Questions Of Evidence And Factual Findings Are Involved In This Case.

Regardless of whether a federal question was *raised* below, it is obvious that this case has not involved constitutional or federal questions. On the contrary, only questions of evidence and factual findings are at issue.

The central issue presented by the petitioners to the Commonwealth Court was whether the Township of Lower Providence had violated a prior Commonwealth Court order dated September 14, 1982. That order had required the Township to issue a permit to operate a sanitary landfill to Moyer's Landfill, Inc. When presented with the allegation that its prior order had been violated by the Township, the Commonwealth Court held two evidentiary hearings and received briefs and oral argument. The Commonwealth Court found as a matter of fact that the Township had fully complied with the 1982 order, by issuing the permit to Moyer's Landfill, Inc.; that the receiver

in charge of Moyer's Landfill, Inc. was the real party in interest entitled to receive the permit; and finally, that the permit had been abandoned by the permittee, Moyer's Landfill, Inc.

The Commonwealth Court's conclusions of fact and law are not federal or constitutional questions such as would trigger the exercise of the jurisdiction of this Court. On the contrary, the facts of this case are so unique that it is difficult to see how its holding could be used in a future case. The body of Pennsylvania law was properly applied by the court and this application is so inexorably entwined with the peculiar circumstances of this case as to preclude review by this Court. The Commonwealth Court recognized the unique factual circumstances, for it designated the opinion of Judge MacPhail "not reported." (R.196a). Petitioners assert that the decision of the court, declining to hold the Township in contempt, will have great precedential value. As previously discussed, the opinion of the Commonwealth Court dated December 19, 1983, is "not reported." By Pennsylvania Rule of Court, opinions and orders which are not reported have no precedential value:

> The [Commonwealth] Court may file memorandum opinions and orders which are not reported. *An unreported opinion of this Court may not be cited as precedent or for any other purpose in any brief, argument or subsequent opinion.* The fact of nonreporting shall be noted on the Court docket and on the face sheet of the opinion....

Rule XV, Internal Operating Procedure of the Commonwealth Court of Pennsylvania. [Emphasis added].

Under Pennsylvania law, an appellate court has the power to enforce its own orders. *See* Act of July 9, 1976, P.L. 586, sec. 2, 42 Pa. C.S.A. sec. 562; Pennsylvania Rule of Appellate Procedure No. 2591(b); *Raum v. Board of Supervisors of Tredyffrin Township,* 29 Pa. Commonwealth Court 9, 370 A. 2d 777 (1977). The failure of a party to obey an order of the Commonwealth Court is a direct affront to that court, punishable by contempt of court or other appropriate order. Petitioners sought to convince the court that the Township had refused to comply with the Commonwealth Court order (Petition for Substitution of Parties and for Enforcement of Order, paragraph 10, R.58a). In this effort, they failed because the Township had, in fact, complied with the Commonwealth Court order. No earth-shaking precedent or changes of law were made by the Commonwealth Court's decision. On the contrary, the opinion clearly affirms past decisions and reinforces the concept that the appellate court can enforce a prior order. In this case, no enforcement was necessary because the order had been fully complied with by the Township.

The Commonwealth Court rendered the initial decision in *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township,* 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982). It drafted the order which compelled the Township to issue the permit to Moyer's Landfill, Inc. The integrity of its judgment and its order was at stake if th Township disobeyed that order.

The Commonwealth Court, after receipt of the petition for enforcement of the order and answer thereto, held an evidentiary hearing to determine whether the Town-

ship had complied with its order of September 14, 1982. Witnesses for both sides were called, testified, and were cross-examined. In due course, the Court issued its opinion finding that the Township had complied with the order of September 14, 1982 by issuing the zoning permit to Moyer's Landfill, Inc. After careful consideration of the petitioners' petition for rehearing, the Commonwealth Court *en banc* affirmed the decision that the integrity of the Commonwealth Court had not been compromised. Surely the Commonwealth Court is the best judge of when its own order has been obeyed. The Supreme Court of Pennsylvania certainly agreed, for it dismissed the appeal. There is simply no issue of federal or constitutional law involved here. Neither is there an issue of state law. The sole question was one of fact.

C. The Allegedly Conflicting Decisions Are State Court Decisions Involving State Laws, Are Not Applicable To This Case, And Are Completely Distinguishable On Their Facts.

Petitioners, in an effort worthy of Procrustes, attempt to fit this case into a constitutional framework by alleging that the Commonwealth Court decision conflicts with state and federal court decisions on zoning. All of these cases are inappropriately cited and completely distinguishable on their facts.

The question of whether an appellate court's prior order has been obeyed is certainly a question of state law applied to the particular facts of each case. The question of whether a permit has been abandoned is also a question of state law applied to the particular facts of each case. In an attempt to argue that the Commonwealth

Court was in error, petitioners raise again the same arguments which they raised before the Commonwealth Court *en banc* and the Pennsylvania Supreme Court. These arguments focus on general principles of the Pennsylvania law of zoning, the Pennsylvania Municipalities Planning Code (Act of July 31, 1968, P.L. 805, as amended, 53 P.S. sec. 10101 et seq.), and past Pennsylvania court decisions. Not a single one of these arguments raises a federal or constitutional issue. Any review of the Commonwealth Court's decision applying principles of state law is exclusively within the jurisdiction of the Pennsylvania Supreme Court. That court, after briefing and oral argument, dismissed the appeal as being improvidently granted, apparently recognizing that the Commonwealth Court was the best judge of whether its own order had been violated.

This Honorable Court has no jurisdiction to review a state court order based upon state grounds. As the Court stated in *Herb v. Pitcairn,* 324 U.S. 117, 125-26:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

The Commonwealth Court did not incorrectly adjudge federal rights, for no federal rights are at issue here. Therefore, this Honorable Court has no jurisdiction to review the state court's decision.

In a flimsy effort to take this case out of the Pennsylvania state law area, petitioners cite several decisions of this Court. Apparently, petitioners feel that it is suffi-

cient to scatter a handful of Supreme Court cases throughout a writ of certiorari in order to invoke this Court's jurisdiction, for none of the cases cited has any relevance to the instant case. Petitioners cite *San Diego Gas and Electric Co. v. City of San Diego,* 450 U.S. 621 (1981), an inverse condemnation case wherein the Court denied certiorari for lack of jurisdiction. They then cite *Agins v. City of Tiburon,* 447 U.S. 255 (1980) and *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), involving inverse condemnation, for the general principle that municipal zoning regulations could constitute a taking. Even the venerable case of *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) is dredged up by petitioners in their search for federal citations.

The seeding of the writ of certiorari with past Supreme Court decisions cannot help the petitioners find a federal question. Petitioners use innuendo and hint at complicity between the Receiver and the Township to squeeze this case into the "protective umbrella" of the Fifth and Fourteenth Amendments. Fortunately, innuendo cannot create a federal question.

In a final effort to create a viable federal issue out of the facts of this case, the petitioners argue that this Court's review is warranted because there is an apparent conflict in the types of relief afforded by other state courts in municipal ordinance challenges. Apparently, the petitioners want this Court to correct the state courts' determination of the remedies that will be given to successful litigants.

There are several problems with petitioners' argument. The most obvious is that the state courts' deter-

mination of the relief afforded to litigants is a question of state law. The fact that two states may have conflicting decisions is not a federal issue to be resolved by this Court. Petitioners are arguing for conformity among decisions of the highest state courts on the same subjects. They want this Court to require all state courts to reach the same decision. Such a result is a direct affront to the separation of powers between the state and federal courts, and is anathema to the Constitution.

Secondly, the petitioners are arguing that the Commonwealth Court, by ordering the Township to issue the permit to Moyer's Landfill, Inc., did not provide the appropriate relief. Rather, say the petitioners, the court should have ordered a rezoning of the property of the successful litigant. Regardless of the fact that Moyer's Landfill, Inc. never requested court-ordered rezoning as a remedy in the original litigation, it is nevertheless too late for petitioners to challenge the relief ordered on September 14, 1982, in this Court. Once again, the petitioners blur the procedural history of this case. They are arguing now that the Commonwealth Court order of 1982 was not the right remedy. Yet no challenge was made to that order by the petitioners. They certainly cannot collaterally attack it now in this proceeding.

There are no federal grounds which would require this Court's review in this case. The facts of this case are unique. The Commonwealth Court decision is based upon its resolution of the factual issues under Pennsylvania law. The writ of certiorari is, therefore, without merit and must be denied.

D. The Court Below Fully Considered And Correctly Decided The Issues.

An analysis of the Commonwealth Court opinion yields two issues which were decided by the court: (1) Whether Moyer's Landfill, Inc., by the Receiver, was the real party in interest entitled to receive the permit; and (2) whether Moyer's Landfill, Inc., abandoned the permit by returning it to the Township with the stated intention not to use it.

The Commonwealth Court found that the Receiver for Moyer's Landfill, Inc. was the only real party in interest at the time she requested the permit. Furthermore, the Township complied with the order of September 14, 1982 by issuing the permit to Moyer's Landfill, Inc.

The Commonwealth Court looked to the applicable law and the particular facts of this case to determine whether the Receiver was the real party in interest in this case.

By order of the Honorable Louis J. Pollock of the Federal District Court for the Eastern District of Pennsylvania dated July 16, 1982, Joanne Denworth was appointed the Receiver for Moyer's Landfill, Inc. The order specifically provided that:

> The Receiver shall immediately take possession of all assets of Defendants Moyer's Landfill, Inc. . . . and shall have the authority to manage, sell, discharge, dispose of, lease, encumber and quiet title to such assets, for the purpose of implementing the Consent Decree.

Certainly, a permit ordered by the Commonwealth Court to be issued to Moyer's Landfill, Inc. qualifies as

an asset of Moyer's Landfill, Inc. And yet, petitioners argued that the Receiver had "questionable authority" to request the permit from Lower Providence Township.

The law on the authority of a Receiver to act on behalf of the entity whose property is in receivership is clear.

> The Receiver stands in the shoes of the corporation or person whose property is in receivership with exactly the same rights and obligations, with respect to such property, that such person had at the inception of the receivership . . .

Pennsylvania Turnpike Commission v. Evans, 13 Pa. D & C 2d 290, 298-99 (1958).

Absent any evidence to the contrary, the Receiver stepped into the shoes of Moyer's Landfill, Inc. In the instant situation, the "shoes" are the right of Moyer's Landfill, Inc. to the permit ordered by the Commonwealth Court.

In the petition for substitution of parties and enforcement of court order dated September 14, 1982, petitioners averred that an agreement dated May 11, 1983 established that the appellants were entitled to the permit as successors in interest to Moyer's Landfill, Inc. The petitioners averred that the entity known as Moyer's Landfill, Inc. was operating under the supervision of a court-appointed Receiver (which fact was admitted by the Township, and must be accepted as true). No mention was made in this petition of agreements pre-dating the Receivership.

It is obvious that the petitioners were relying on the agreement of May 11, 1983 to assert a claim to the permit. The Commonwealth Court considered this argument and reviewed the May 11, 1983 agreement. The court said:

> Here, Petitioners confront us with an agreement dated May 11, 1983 by the terms of which the receiver acknowledges that AES has taken by assignment the rights of Moyer's under Moyer's agreement with P.B., and by the terms of which the receiver *disclaims* any interest in permits for the landfill in subject tract. ***In our judgment, the receiver was giving up permit rights she no longer had and her recognition of AES as the real party in interest as of May 11, 1983 is after the fact.***

(Emphasis added).

There can be no dispute that an agreement of May 11, 1983 which the petitioners claimed assigned them Moyer's right to a permit has no effect on the rights of the parties previous to that date. (This claim of the assignment of Moyer's right to the permit is clearly open to debate, in and of itself). Therefore, the agreement of May 11, 1983 has absolutely no relevance to the rights of Moyer's Landfill, Inc. to request the permit and the duty of Lower Providence Township to issue it to Moyer's Landfill, Inc.

The May 11, 1983 agreement is, however, highly relevant and informative in another regard. Obviously, the petitioners at the time considered the Receiver to be the real party in interest to request and receive the permit. After the permit was requested by the Receiver, the petitioners entered into "negotiations" with the Receiver to obtain the right to the permit. The culmination of these negotiations resulted in the Receiver agreeing to disclaim any interest in the permit and the petitioners agreeing to subordinate liens on the property. It would appear that the petitioners gave up some right regarding these liens in order to obtain a disclaimer from a Receiver who supposedly had "questionable authority" to request the permit. This course of conduct and pleadings indicate that the

petitioners believed that the Receiver was the real party in interest entitled to the permit.

Furthermore, the petition for substitution of parties asserts that the May 11, 1983 agreement with the Receiver is the basis for substituting petitioners as the real party in interest entitled to the permit. Clearly, the petitioners cannot now argue that the Receiver did not, in fact, have the authority to request the permit from the Township.

Failing to establish that the May 11, 1983 agreement is a basis for finding that the Township violated the September 1982 agreement, the petitioners introduced additional documents at the evidentiary hearing. An installment sales agreement and two (2) option agreements executed February 27, 1981 were introduced to support the petitioners' claim that they were the real parties in interest. The Commonwealth Court reviewed the testimony and the agreements. The Court concluded:

> Although there was an installment sales agreement and two (2) option agreements executed February 27, 1981 by the terms of which AES now asserts that it has succeeded to the rights of Moyer's, there is nothing in the chronological statement of events or in the evidence presented at the hearing we held on the instant petitions, which would indicate when AES *exercised* its rights under the option agreements.[5] The installment sales agreement between AES and PB for the subject tract is dated February 28, 1983. *We conclude, therefore, that on September 29, 1982, when the receiver requested that the special exception permit be issued, she, as receiver, and no one else, was the real party in interest entitled to that permit.*
>
> fn. 5. Both option agreements provided that the option should be exercised by AES giving written

> notice to the optioners (Moyer's and P.B. of their intention to exercise the option.)

(R.202a; Emphasis added)

The Receiver stood in the shoes of Moyer's Landfill, Inc. Moyer's Landfill, Inc. was entitled to the permit ordered by the Court as the real party in interest, in September of 1982 when the permit was requested, and in January of 1983 when the permit was received, and in March of 1983 when the permit was abandoned. The Commonwealth Court's finding is well-supported by the evidence. Petitioners, who had the burden of proving that they were the real parties in interest, failed to establish that fact. On the contrary, their original Petition for Substitution of Parties, by relying on the May 1, 1983 agreement as the basis for their claim to be substituted, supports the Court's conclusion that the Receiver was the real party in interest at all relevant times. The *very existence* of the May 11, 1983 agreement proves that the petitioners considered the Receiver to be the real party in interest. The installment sales and option agreements of February 28, 1981 do not establish the rights of the appellants to the permit. The petitioners did not establish when or if the option was properly exercised. The opinion of the Commonwealth Court is solidly grounded in law and fact. The Receiver for Moyer's Landfill, Inc. was the only real party in interest entitled to the zoning permit.

The Receiver stands in the shoes of Moyer's Landfill, Inc. Moyer's Landfill certainly had the right to use the permit to develop the Troop Farm as a sanitary landfill. That was the result of years of litigation culminating in

Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township, 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982). Moyer's Landfill, Inc. was, at all relevant times, from the time the permit was issued until it was returned, free to use that parcel as a landfill, and there would be nothing that the Township or anyone else could do to stop it.

However, it must also be remembered that Moyer's Landfill, Inc. could decide not to so use that land. It could decide to abandon its intention to operate a landfill on the site and return the permit to the Township. The Commonwealth Court did not have the right to deny Moyer's that option. The petitioners do not have the option to deny Moyer's that right. Certainly, the Township did not have the right to deny Moyer's that option.

Petitioners argue that the right to a special exception runs with the land, and not the particular person who owns the land. This is true. However, petitioners misunderstand what is meant by the right to a special exception running with the land. The Commonwealth Court articulated very carefully what the right to a special exception means:

> It must be observed, of course, that a zoning permit for land use pertains to the tract of land itself. If land has been approved for a specific use, it matters not in whose name the permit is issued, Ryan, *Pennsylvania Zoning Law and Practice* sec. 9.14.18 (1981), and under normal circumstances, any person having a proprietary interest in the subject land, could claim the permit or exercise the rights granted to the named permittee. *If AES was the successor in interest to Moyer's, therefore, the mere fact that it was not the named applicant or permittee would not in and of itself bar its right to claim the permit.* (R.200a, emphasis supplied).

But, as already discussed, AES was not the successor in interest to Moyer's at the time the permit was abandoned by Moyer's, if it ever did become Moyer's successor in interest. A successor stands in the shoes of his predecessor. Moyer's could not give what it no longer possessed.

Petitioners misapprehend that the right of a special exception runs with the land, for it is clear that they do not see that a special exception does not have to exist for time immemorial. It is well-settled in Pennsylvania law that special exceptions may expire or be abandoned. Robert Ryan, *Pennsylvania Zoning Law and Practice*, sec. 9.4.30 (March 31, 1981). Contrary to appellants' assertion that there is a magical number of days which constitutes an abandonment (in their opinion, it's more than fifty), abandonment may be evidenced by intent to abandon and the act of abandonment. Certainly, it could not be clearer in the instant case. Moyer's Landfill, Inc. returned the permit to the Township stating that it did not intend to make use of it. Thus, abandonment was proved.

Furthermore, the Commonwealth Court articulated the existing law on the termination of a special exception:

> Since the permit clearly spelled out that unless building commenced within six (6) months the permit would expire, all of Moyer's rights and those who succeeded in interest thereto terminated at the end of six (6) months from the date of issuance.

The court found, as a matter of fact, that Moyer's Landfill, Inc. had abandoned its right to the permit. Subsequently, when petitioners requested the permit from the Township, the permit had long since been terminated.

The petitioners attempted to argue that the Township had acted in bad faith when it issued the permit to the

Receiver. The Commonwealth Court flatly rejected this argument, finding that appellants' allegations were not grounded in the evidence and could not support a finding of bad faith. The court stated:

> . . . we see no evidence that the Township did anything other than what our order permitted and directed it to do. Hints of complicity between the Township and the Receiver are insufficient for us to impose sanctions in the within matter. (R.204a).

As the Commonwealth Court adopted in *Raum v. Board of Supervisors of Tredyffrin Township*, 29 Pa. Commonwealth Ct. 9, 370 A.2d 777, 782 (1977), there must be a standard of showing bad faith in a Pennsylvania Rule of Appellate Procedure 2591(b) proceeding. The petitioners argued that the Township acted suspiciously (1) by issuing the permit to the Receiver; (2) by the subsequent return of the permit by the Receiver with the intention not to use it; and (3) by the rezoning of the district wherein the Troop Farm is related.

First of all, the Township's action in issuing the permit to the Receiver is beyond reproach. Petitioners assert that the Township's failure to give them notice of the issuance of the permit and the return of the permit shows bad faith on the part of the Township to defeat Landowner's right to the zoning permit and the landfill use approved by the Commonwealth Court. This argument is ludicrous. The Receiver for Moyer's Landfill, Inc. was the only real party in interest entitled to the permit. The Township, in issuing a zoning permit, is not required to notify third parties not involved in the transaction. No one, including petitioners, put the Town-

ship on notice that there was a dispute over the issuance of the permit to Moyer's Landfill, Inc.

Petitioners assert that the Township was on notice of their interest and should have notified them of the issuance and return of the permit. Leaving aside for the moment the fact that petitioners had actual notice of the issuance of the permit, the petitioners argue that the Township had the duty to independently evaluate the interests of Petitioners which may have been raised in an unrelated matter, determine if they are the real parties in interest and notify them of the issuance of the permit to another party. Even if this impossible standard were imposed on the Township in this case, the fact remains that the Receiver for Moyer's Landfill, Inc. was the real party in interest. The Township had no duty or reason to correspond with petitioners regarding the permit.

Secondly, petitioners contend that the action of the Receiver in returning the permit evidences the bad faith of the Township. Surely, even if, assuming arguendo, that the Receiver did act in bad faith, such motives could not be imputed to the Township. The petitioners further assert that there was a lack of good faith and fairness because the Receiver, despite alleged negotiations with the petitioners requested and received the permit. Again, the Commonwealth Court was asked to impute allegedly bad faith motives of a third party to the Township. Surely, to do so would indeed be manifest unfairness.

Although the question of the Receiver's alleged bad faith, even if proved, is irrelevant and has no bearing on the alleged bad faith of the Township, it must be pointed out that the petitioners did not prove any bad faith on

the part of the Receiver. The burden of proving bad faith is on the petitioners. There is no doubt that they failed to carry that burden.

Finally, petitioners urge that the Township engaged in "retributive zoning" of the district wherein the Troop Farm is located. The use of the pejorative "retributive zoning" is just not applicable to the rezoning in this case. The facts in this case simply do not support a retributive zoning argument. The Township rezoned this property along with a large portion of other properties to R-1 Residential in December, 1982. That was the culmination of years of work and study. The Montgomery County Planning Commission had been recommending such a rezoning over a period of many years. (R.302a). *After* that rezoning had taken place in December, 1982, the Supreme Court of Pa. denied Township's Petition for Allowance of Appeal in the instant case. Thereafter, in *January, 1983,* the Township, in total disregard of the rezoning, issued a permit to Moyer's Landfill, Inc. for the use of the property as a landfill! How can that rezoning be called retributive? Moyer's was at all times, from the time that permit was issued, free to use that parcel as a landfill. Had Moyer determined to operate a landfill on that site, that is exactly what would be there now and there was nothing that the Township could do to stop it. Once that permit was provided to Moyer's in spite of the changed zoning, that change in the zoning becomes meaningless and retributive zoning cases and arguments are totally irrelevant. Petitioners confuse the actions of Moyer's in abandoning the permit with the action of the Township in rezoning the property. The Township is not responsible for the action of Moyer's Landfill, Inc.

There is nothing compelling about petitioners' retributive zoning arguments. Obviously, for these reasons, the instant case is easily distinguishable from *Raum v. Board of Supervisors*, 29 Pa. Commonwealth Ct. 9, 370 A.2d 777 (1977). Unlike *Raum, supra,* the Township in this case did not attempt to thwart the order of September 14, 1982 by unwarranted delays, retributive rezoning, unreasonable fee schedules and other dilatory tactics. *The Township issued the permit.*

IV. CONCLUSION

The essentially factual nature of this case, the absence of any federal or constitutional grounds, and the failure of petitioners to raise and preserve a federal question compel the denial of the petition for writ of certiorari. There is no conflict created by the Commonwealth Court decision with any federal case, Pennsylvania case or other state case. On the contrary, the lower court decision follows the principles of Pennsylvania law on zoning, property law and real party in interest principles. There are no compelling federal questions or violations of the Fifth and Fourteenth Amendments.

By order of September 14, 1982, the Commonwealth Court directed the Township to issue a permit to Moyer's Landfill, Inc. The Township obeyed. Moyer's Landfill, Inc. subsequently abandoned the permit. The petitioners, who assert rights based on a post-abandonment agreement, are strangers to the transaction. Their business enterprises may not have met their expectations, but

their Fifth and Fourteenth Amendment rights have not been violated by the Township.

There is no federal statute involved in this case. There is no conflict with other federal or state decisions involving constitutional rights. Petitioners have had their day in court, and they lost. There are no grounds whatsoever for the exercise of the jurisdiction of this Honorable Court.

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD C. SHEEHAN
Attorney for Respondent

2790 Egypt Road
Audubon, PA 19403
(215) 666-7464

OPINION OF THE
HONORABLE JOHN A. MacPHAIL

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1741 C.D. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER
PROVIDENCE TOWNSHIP,

Appellee

BEFORE:
HONORABLE JOHN A. MacPHAIL, Judge

HEARD: November 21, 1983

OPINION NOT REPORTED

MEMORANDUM OPINION

BY JUDGE MacPHAIL Filed December 19, 1983

On September 14, 1982, this Court entered an order in *Moyer's Landfill, Inc. v. Zoning Hearing Board of Lower Providence Township*, 69 Pa. Commonwealth Ct. 47, 450 A.2d 273 (1982)[1] directing the zoning authorities of Lower Providence Township (Township) to issue a permit to Moyer's Landfill, Inc. (Moyer's) for the operation of a sanitary landfill on a tract of land containing 131 acres adjoining another tract of 47 acres upon which Moyer's had been conducting a landfill since 1974.[2] The subject tract is located in what was, at the time the

zoning proceedings were commenced, an I-Industrial zoning district. By an amendment to its zoning ordinance in 1977, the Township provided that sanitary landfills would be permitted uses in the I-Industrial district as a special exception. This amendment occurred after Moyer's had filed a constitutional challenge to the zoning ordinance on the basis that it excluded the legitimate use of land for the operation of a sanitary landfill. On December 13, 1982, the Township again amended its zoning ordinance by rezoning the area in which the subject tract is located as an R-1 Residential district. A sanitary landfill is not a permitted use in R-1 districts.

The matters now before us consist of: (1) the petition of Providence Builders, Inc. (PB) and Alternate Energy Store, Inc. (AES) for (a) an order of this Court to enforce its prior order of September 14, 1982 by directing the zoning authorities of the Township to issue a permit for the sanitary landfill to them and (b) permitting them[3] to be substituted as parties in the within action and (2) the motion of the Township to dismiss the petition of PB and AES because they are not proper parties before this Court.

It must be explained that the tract of land which was the subject of our order of September 14, 1982 was owned at all pertinent times by PB and, according to testimony we received, is still owned by that corporation. Since our order of September 14, 1982, it appears that Moyer's has defaulted on its real estate installment sale agreement with PB. AES avers that pursuant to an option agreement with Moyer's, it has taken by assignment Moy-

er's rights as the purchaser of the subject tract under the real estate installment sale agreement. Because AES now stands in the shoes of Moyer's, it contends that it may be substituted as the real party in interest in the action which was adjudicated in 1982, and is entitled to have the zoning permit in question issued to it. AES, indeed, applied for that permit to the Township. The zoning officer refused to approve the application asserting that (1) the permit had already been issued and returned to the Township and (2) the tract has been rezoned R-1, a classification which would not permit a sanitary landfill at the time AES submitted its application.

The Township presented evidence that when a receiver was appointed for Moyer's in proceedings in federal court, that receiver applied for and was granted a special exception permit by the Township to permit a landfill on the subject tract. On March 18, 1983, that permit was returned by the receiver to the Township. It is the Township's position that they have complied with our order of September 14, 1982 by issuing that permit and that no permit for a sanitary landfill may now be issued for the tract which, as we have noted, has since been rezoned.

Some of the lesser issues in this case have been resolved by a prior decision of this Court. In *Raum v. Tredyffrin Township Board of Supervisors,* 29 Pa. Commonwealth Ct. 9, 370 A.2d 777 (1977) we held, *inter alia,* that (1) this Court has the inherent power to issue an appropriate order in aid of our judgment where one of the parties refuses to abide by a decision of the Court and (2) where we have ordered that a petitioner be permitted to proceed under a zoning ordinance, that peti-

tioner cannot be denied his right by a subsequent change in the pertinent zoning ordinance. *See also Casey v. Zoning Hearing Board,* 459 Pa. 219, 328 A.2d 464 (1974).

It must be observed, of course, that a zoning permit for land use pertains to the tract of land itself. If land has been approved for a specific use, it matters not in whose name the permit is issued, Ryan, *Pennsylvania Zoning Law and Practice* §9.4.18 (1981), and under normal circumstances, any person having a proprietary interest in the subject land, could claim the permit or exercise the rights granted to the named permittee. If AES was the successor in interest to Moyer's, therefore, the mere fact that it was not the named applicant or permittee would not in and of itself bar its right to claim the permit.

The Township contends, of course, that when it issued the special exception permit to the receiver, it was complying with the order of this Court. Since the permit clearly spelled out that unless building commenced within six (6) months the permit would expire, all of Moyer's rights and those who succeeded in interest thereto terminated at the end of six (6) months from the date of issuance.[4] If this was the usual case where a special exception permit had been requested and granted, the Township clearly would prevail. As we have already indicated, however, this is far from the usual case.

We deem it necessary to first review what it was that this Court ordered in September of 1982. While it is true that we discussed both the constitutional challenge to the ordinance and the subsequent amendment permitting the use of the subject tract as a sanitary landfill by special exception, our order clearly was intended to provide that

a zoning permit be granted to the applicant. The discussion of the special exception aspect of the case was after we had already decided that the constitutional challenge should be sustained. At the time that challenge was made, the zoning ordinance excluded sanitary landfills. The Township's subsequent amendment was an effort to rehabilitate its ordinance after the proceedings challenging it had commenced and clearly could not remedy the fatal defect as to Moyer's. Our resolution of the special exception issue was secondary to our conclusion that the zoning ordinance was constitutionally infirm.

Having said that, we must recognize, at the same time, that we *did* hold that Moyer's was entitled to a special exception permit as well. It is necessary then, for us to consider at this time whether the issuance of such a permit by the Township to the receiver for Moyer's was full compliance with our order.

There can be no doubt that a receiver stands in the legal "shoes" of the debtor and, subject to court approval, may exercise all of the legal rights of the debtor. From the chronological recitation of events in the brief of Petitioners, we learn that the receiver was appointed for Moyer's on July 16, 1982. Although there was an installment sales agreement and two (2) option agreements executed February 27, 1981 by the terms of which AES now asserts that it has succeeded to the rights of Moyer's, there is nothing in the chronological statement of events or in the evidence presented at the hearing we held on the instant petitions, which would indicate when AES *exercised* its rights under the option agreements.[5] The installment sales agreement between AES and PB for the subject tract is dated February 28, 1983. We con-

clude, therefore, that on September 29, 1982, when the receiver requested that the special exception permit be issued, she, as receiver, and no one else, was the real party in interest entitled to that permit.

Petitioners point out that the receiver previously had represented to this Court in a petition for a stay order submitted before our decision of September 12, 1982, that Moyer's would not be in a position to proceed with the permit because of insolvency. That allegation is made, presumably, to indicate that the receiver may have acted in bad faith when she later requested the permit. We think that the most that could be said is that the receiver changed her mind.

We hold that the issuance of the special exception permit by the Township to the receiver was literal compliance with our order of September 14, 1982. The receiver could have asked for a "zoning permit" rather than a special exception permit[6] but she did not. Her failure in that respect cannot now be seized upon by Petitioners to compel the Township to issue yet another permit pursuant to our order.

The final question to be resolved is whether the return of the special exception permit by someone authorized by law to act for the named permittee constitutes a cancellation or abandonment of that permit. Here, Petitioners confront us with an agreement dated May 11, 1983 by the terms of which the receiver acknowledges that AES has taken by assignment the rights of Moyer's under Moyer's agreement with PB, and by the terms of which the receiver disclaims any interest in permits for the landfill in subject tract. In our judgment, the receiver was

giving up permit rights she no longer had and her recognition of AES as the real party in interest as of May 11, 1983 is after the fact.

We have no difficulty ascertaining that feelings of the litigants in this case are very strong. We realize that our decision today is a declaration that Moyer's won the battle but lost the war. On the other hand, we see no evidence that the Township did anything other than what our order permitted and directed it to do. Hints of complicity between the Township and the receiver are insufficient for us to impose sanctions in the within matter.

Inasmuch as we have disposed of this matter on the merits of the Petitioners' petition, we need not address the Township's motion to dismiss.

/s/ John A. MacPhail, Judge

FOOTNOTES

[1]Petition for allowance of an appeal to the Pennsylvania Supreme Court was denied January 14, 1983.

[2]Moyer's had an equitable interest in the 131 acre tract as a purchaser in an installment sale contract.

[3]Although PB and AES are joint petitioners and are referred to in this opinion as Petitioners, it is apparent from the evidence taken by this Court and the pleadings that PB has yielded whatever rights it may have had as a landowner to Moyer's and/or AES.

[4]When the receiver returned the permit to the Township, she said it was being returned "since I do not intend to make use of this permit".

[5]Both option agreements provided that the option should be exercised by AES giving written notice to the optionors (Moyer's and PB) of their intention to exercise the option.

[6]There is nothing to indicate one way or the other whether under the Township's ordinance a similar time restriction may have been applicable to zoning permits which were other than special exception permits.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 1741 C.D. 1981

MOYER'S LANDFILL, INC.,

Appellant

v.

ZONING HEARING BOARD OF LOWER
PROVIDENCE TOWNSHIP,

Appellee

O R D E R

The petition of Providence Builders, Inc. and Alternate Energy Store, Inc. for enforcement of court order and for substitution as parties in the within matter, is denied.

DATE: December 19, 1983

/s/ John A. MacPhail, Judge